

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment?
- (2) Is claimant entitled to medical treatment for his injuries alleged?
- (3) Did claimant provide timely notice of accident?
- (4) Did claimant provide timely written claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed.

Claimant alleges accidental injury on April 4, 2004, when, while helping carry sandbags, he suffered an alleged injury to his right knee and to his abdomen, just above the navel. Claimant testified at preliminary hearing that he advised his supervisor "Archie" of the accident. However, claimant's containment division manager, Robert Cutright, testified that there was no Archie employed with them. However, respondent's representative Leann Follett testified that claimant's supervisor was R.C. The only R.C. connected to this case is Robert Cutright. Mr. Cutright testified that he goes by "R.C."¹ Mr. Cutright, who did testify at the preliminary hearing, stated that claimant never advised him of any work-related injury and never requested any medical care. Claimant only speaks Spanish. Mr. Cutright did state that he was able to communicate with claimant in Spanish, although it does not appear from this record that Mr. Cutright is fluent. Mr. Cutright also testified, however, that several bilingual people worked for respondent, and communication would not have been a problem.

Claimant continued working for respondent through a date which is unclear from this record. Claimant testified to working 15-day periods and acknowledged that after the accident, he completed a 15-day period, but it cannot be determined whether that was claimant's last 15-day period or one of several, with claimant ceasing work earlier than originally anticipated.

After leaving respondent's employment, claimant proceeded by bus to Oregon, where he went to see his brother in order to obtain assistance from his brother. Claimant also, at some point, relocated to Texas. Claimant admitted into evidence a letter to Susan Lang, with the United States Department of Labor's Wage and Hour Division in Wichita, Kansas.² There is no indication that this letter was ever presented to respondent or, if so, on what day it may have been presented. The letter does discuss in detail a wage and hour claim filed by claimant and several other employees of respondent. The letter indicates that claimant did suffer an injury on approximately April 4, but that claimant did not report the injury as he was afraid of what R.C. (Archie) would say or do in response. Again, the identity of Archie (R.C.) is not clarified. However, having a supervisor named Robert Cutright (R.C.) does raise a question in the mind of this Board Member.

¹ P.H. Trans. (Apr. 12, 2005) at 7.

² Follett Depo., Cl. Ex. 5.

Also admitted into evidence was a letter dated May 25, 2004, to Matt Milburn, a claims adjuster for respondent's workers compensation carrier.³ This letter claims benefits for the April 4, 2004 injury. It also states that claimant notified his supervisor at the time he sustained the injuries. This record, therefore, contains two conflicting documents regarding whether claimant provided notice of injury to the employer. Additionally, both Mr. Cutright and Ms. Follett deny being advised that claimant suffered an accidental injury at any time while claimant was employed with them.

The E-1 Application For Hearing was filed with the Division of Workers Compensation, with the first filing date showing October 4, 2004. This alleges an April 4, 2004 date of accident, with claimant suffering injury to his abdomen and his right lower extremity. The injury to the right lower extremity is also confused in this record, as claimant testified at his deposition that he suffered injury to his right knee and stomach⁴ and later discussed an injury to his foot.⁵ The ALJ also expressed concern with claimant's allegations of pain in his stomach and difficulties following a bowel movement.

To add further confusion to this record, claimant submitted the Affidavit of Daniel Mendez,⁶ claimant's co-worker. In the Affidavit, Mr. Mendez describes two separate injuries—one when claimant fell off a trailer, and another when claimant was lifting sandbags. In claimant's testimony at the time of his deposition, he discusses a single injury, while carrying sandbags. Claimant testified he injured both his knee and his stomach at that time. There is no indication in claimant's testimony that he fell off of a trailer.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.⁷ The Board cannot find from this confusing record that claimant has proven that he suffered accidental injury arising out of and in the course of his employment on the date alleged or in the manner alleged. The Board, therefore, affirms the ALJ's determination that claimant has failed to prove accidental injury arising out of and in the course of employment and denies benefits accordingly.

³ Follett Depo., Cl. Ex. 6.

⁴ Franco-Lopez Depo. at 5.

⁵ *Id.* at 29.

⁶ P.H. Trans. (Apr. 12, 2005), Cl. Ex. 2.

⁷ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

K.S.A. 44-520 mandates that notice of accidental injury be provided to the employer within 10 days of the accident. Claimant testified that he advised his supervisor of the accident on the date alleged, but both respondent representatives who testified in this matter deny being advised of any accident. Additionally, two written documents provided from outside sources conflict with regard to whether claimant told his supervisor of the accident or was afraid to. The Board cannot find, for workers compensation purposes, that claimant has proven that he provided notice of accident pursuant to K.S.A. 44-520 and denies claimant's allegation based upon a lack of notice.

K.S.A. 44-520a requires written claim be submitted within 200 days after the date of accident. In this instance, claimant's E-1 Application For Hearing was filed on October 4, 2004, alleging an accidental injury of April 4, 2004. As October 4, 2004 is within 200 days of the alleged date of accident, the Board finds that claimant did submit timely written claim as required by K.S.A. 44-520a.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Steven J. Howard dated June 30, 2005, denying claimant benefits for failure to prove he suffered accidental injury arising out of and in the course of his employment, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2005.

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director